ADMINISTRATIVE APPEAL OF HELEN S. KIRSCHLING
v.
BUREAU OF INDIAN AFFAIRS

IBIA 77-22-A Decided March 17, 1978

Appeal from action by the Bureau of Indian Affairs assessing administrative fees in the amount of $74,671.77 for the issuance of special allotment timber cutting permits.

Dismissed in part; referred to Assistant Secretary for Indian Affairs.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--
Indian Lands: Forestry: Timber Sales Contract: Administrative Fees

Determining the reasonableness of administrative fees assessed under authority of 25 CFR 141.18 is a matter requiring the exercise of discretionary authority and as such the issue must be directed to the Assistant Secretary for Indian Affairs for resolution.

The Board of Indian Appeals may not resolve a discretionary matter without clear authority from the Secretary.

2. Indian Lands: Forestry: Timber Sales Contract: Administrative Fees

Under existing regulations neither the Superintendent nor the Area Director had the authority to require collection of other than a 5 percent fee from appellant in the absence of special instructions from the Secretary.

3. Indian Lands: Forestry: Timber Sales Contract: Administrative Fees

The Secretary or the Assistant Secretary for Indian Affairs has authority to reduce the fixed fees described at 25 CFR 141.18 regardless of whether the charge is for timber sold under regular supervision.

4. Bureau of Indian Affairs: Generally

Appellant's pending court action does not present a bar to further agency review.

APPEARANCES: Argal Oberquell, Esq., Lacey, Washington, for appellant; Richard DeClerck, Esq., Regional Solicitor's Office, Department of the Interior, for respondent.

## OPINION BY ADMINISTRATIVE JUDGE HORTON

### Background

This is an appeal by Helen S. Kirschling, appellant, contesting the amount of administrative fees assessed by the Bureau of Indian Affairs (BIA), respondent, on five special allotment timber cutting permits.

Appellant owns five parcels of trust land on the Quinault Indian Reservation. In August of 1976 she received five special allotment timber cutting permits from BIA for which she was assessed a fee of $74,671.77. This fee constituted 5 percent of the appraised value of the timber on the five parcels. It was imposed under authority of 25 CFR 141.18 which states:

> In sales of timber from either allotted or unallotted lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands, including the cost of timber sale administration, but not including the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction, or the manner in which it is to be made, there shall be deducted 10 percent of the gross amount received for timber sold under regular supervision, and 5 percent when the timber is sold in such a manner that little administrative expense by the Indian Bureau is required. Service fees in lieu of administrative deductions shall be determined in a similar manner.

On September 9, 1976, appellant, through counsel, filed a notice of appeal to the Secretary of the Interior from BIA's assessment of the administrative fees in question. This notice was filed with the Portland Area Office. By memorandum dated September 13, 1976, the Assistant Area Director (Economic Development), Portland Area Office, recommended to the Commissioner that the appeal be denied. Appellant, by letter dated October 7, 1976, advised the Commissioner's Office of her disagreement with the recommendation made by the Portland Area Office.

By letter dated December 7, 1976, the Acting Director of the Office of Trust Responsibilities, BIA, advised appellant's counsel, in effect, that no official appeal had yet been accomplished by appellant.

By letter dated January 1, 1977, appellant, pro se, on instructions apparently obtained by telephone from the Director, Office of Trust Responsibilities, on December 21, 1976, notified the aforesaid official that her letter constituted a formal appeal of the Area Director's "decision" of September 13, 1976.

On February 4, 1977, the Acting Director of the Office of Trust Responsibilities sent a memorandum to the Director, Office of Hearings and Appeals, Attention: Board of Indian Appeals, which states in pertinent part:

> Mrs. Helen (Sanders) Kirschling represented by Mr. Argall S. Oberquell, attorney at law, is appealing the Portland Area Director's decision of September 13, 1976 * * *. Because of the complexities of this case and Mrs. Kirschling's request for a fact-finding hearing, we are referring the appeal to your office for review and decision pursuant to 25 CFR 2.19(a)(2). [1/]

By order dated February 16, 1977, the Board, in accordance with 43 CFR 4.361(a), referred this matter to the Chief Administrative Law Judge for a fact-finding hearing and recommended decision.

A hearing was held on May 6, 1977, in Aberdeen, Washington, by Chief Administrative Law Judge L. K. Luoma. Judge Luoma issued a recommended decision on November 30, 1977, in which he concluded that

---

1/ That section provides in part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired the Commissioner of Indian Affairs shall:

* * * * * *

"(2) Refer the appeal to the Board of Indian Appeals for decision."

the administrative fee charged appellant was unreasonable and that she should only be charged 3 percent of the appraised value of the timber sold.

Respondent, through the Office of the Regional Solicitor, Department of the Interior, Portland Area Office, filed exceptions to the Recommended Decision on February 6, 1978. Respondent's first exception alleges that the Board of Indian Appeals does not have jurisdiction to determine the reasonableness of the administrative fee assessed by appellant. 2/

Scope of Jurisdiction

It is necessary at the outset to resolve the jurisdictional conflict which has arisen.

[1] The Board agrees with the position of the Regional Solicitor that we lack jurisdiction to determine the reasonableness of the administrative fee at issue. Such a determination clearly involves the exercise of discretionary authority. Departmental regulations preclude the Board from reviewing BIA decisions which arise from the exercise of discretionary authority. See 25 CFR 2.19(c) and 43 CFR 4.361(b). The Board has strictly adhered to this requirement. Means Construction Company v. Commissioner, 5 IBIA 242 (1976).

Based on the referral of this matter to the Board by the Commissioner, to whom the Secretary of the Interior had delegated his authority for setting fees under 25 CFR 141.18 3/, Judge Luoma concluded that the Board was duly authorized to determine the issue of the reasonableness of the fees charged appellant (Recommended Decision at 4).

Under the circumstances, Judge Luoma's interpretation of the jurisdictional question is not without support. However, notwithstanding the presence of possible jurisdictional grounds, in the absence of clear authority from the Secretary the Board is of the opinion that it lacks jurisdiction to examine the reasonableness of the fees at issue. Accordingly, this decision will only address the legal questions presented by the appeal. 4/ Pursuant to 43 CFR

---

2/ This argument was first raised by respondent at the hearing (Tr. 10-14).

3/ See 10 BIAM 2.1, 3.1, 3.3 (Exh. No. 8).

4/ On February 23, 1978, the Acting Director, Office of Trust Responsibilities, BIA, addressed a memorandum to the Director, Office of Hearings and Appeals, requesting that this appeal and all documents related thereto be returned to his office for issuance of a final decision. On February 28, 1978, the Director, Office of Hearings and Appeals, replied to this request as follows:

4.361(b), the issue of the reasonableness of the fees charged appellant shall be referred to the Assistant Secretary for Indian Affairs for resolution. 5/

Conclusions of Law

I. Neither the Superintendent of the Western Washington Agency nor the Portland Area Director had authority to require collection of other than a 5 percent fee in the absence of special instructions from the Secretary.

[2] Congress first authorized the Secretary of the Interior to collect reasonable fees for work performed for Indian tribes or individual Indians in 1920. Act of February 14, 1920, 41 Stat. 415 (amended at 47 Stat. 1417), 25 U.S.C. § 413. This Act and departmental regulations promulgated thereunder have to date survived judicial challenge. United States v. Eastman, 118 F.2d 421 (9th Cir. 1941); Quinault Allottee Association v. United States, 485 F.2d 1391 (Ct. Cl. 1973)

The assessment of administrative fees for expenses incurred in the sale of timber on Indian trust land received specific Congressional approval by the Act of April 30, 1964, 78 Stat. 186, 25 U.S.C. § 406(a).

Departmental officials are required to perform their functions in accordance with regulations. It would not have been permissible, therefore, for either the Superintendent of the Western Washington

---

fn. 4 (continued)

"This is in response to your memorandum dated February 23, 1978, in which you request that the above-cited administrative appeal be referred to your office for decision because the matter involves exercise of the Secretary's discretionary authority.

"I am advised by the Board of Indian Appeals that the Kirschling appeal involves questions of law as well as discretionary issues. In accordance with 43 CFR.4.361(b), the Board fully intends to refer such issues which require the exercise of discretionary authority to the Bureau of Indian Affairs for resolution.

"I am further advised that the briefing time has expired in this case and that it is now under consideration for decision. To insure the integrity of our Department's quasi-judicial process, and in fairness to all parties, I believe it would be inappropriate for the Board to divest itself of jurisdiction over legal questions which it lawfully acquired."

5/ The evidence adduced at the hearing, the posthearing briefs of the parties, Judge Luoma's thorough recommended decision and the exceptions filed thereto, should be of inestimable value to the Assistant Secretary in arriving at a just decision on this issue.

Agency, BIA, or the Portland Area Director to ignore the clear provisions of 25 CFR 141.18 by assessing a lesser fee than they are required by regulation to collect. Nor are the boards of appeal within the Office of Hearings and Appeals vested with authority to declare a departmental regulation invalid. Buffalo Mining Company, 2 IBMA 226, 80 I.D. 630 (1973); State of Alaska, 19 IBLA 178, 183 (1975).

II. The Secretary or the Assistant Secretary for Indian Affairs has the authority to reduce the fixed fees described at 25 CFR 141.18, regardless of whether the charge is for timber sold under regular supervision.

[3] In apparent recognition that a fixed fee might not always represent a reasonable fee, 25 CFR 141.18 permits the Secretary to authorize a different deduction from the proceeds of a sale. As previously noted, this authority was delegated by the Secretary to the Commissioner. On September 26, 1977, the position of Assistant Secretary for Indian Affairs was created to discharge, among other things, "all the authorities and responsibilities of the Commissioner" (42 FR 53682).

Respondent argues in its posthearing brief that "[a]lthough the Secretary has deemed it proper and reasonable to reduce by special instructions the fees charged for timber sold under regular supervision, he has not done the same thing for fees charged for timber sold under circumstances such as we have here with special cutting permits" (Brief of Bureau of Indian Affairs, filed August 1, 1977, at 5-6).

The Board considers the foregoing to be an illogical and obviously invalid interpretation of 25 CFR 141.18. 6/

III. Appellant's pending court action does not present a bar to further agency review.

[4] Appellant, formerly known as Helen Mitchell, is a plaintiff in litigation pending before the Court of Claims (Docket Nos. 772-71, 773-71, 774-71, and 775-71). At issue in Docket No. 775-71 is the reasonableness of charges assessed appellant under authority of 25 U.S.C. §§ 413, 406(a), and 25 CFR 141.18. Appellant's counsel in the appeal at hand does not regard the particular fees before us as an issue in the above case (Posthearing Brief of Helen S.

---

6/ As noted by Judge Luoma in the recommended decision (at 5-6), respondent seems unable to justify why the Department should only consider deductions on regular sales of timber. It appears from the record that respondent's construction of 25 CFR 141.18 is based primarily on administrative convenience. See Tr. 29-32, 47-52, 64-65, 82-84.

Kirschling, filed August 9, 1977, at 3). Appellant's attorney of record in the Court of Claims' action disagrees. 7/ Assuming arguendo that the specific fees at issue are involved in appellant's pending litigation, there have been no restraints placed by the Court on the defendant Secretary from proceeding further in this matter. The suit has been pending since 1972 and a trial has still not been scheduled. 8/

Under the circumstances, it would not seem appropriate for the Secretary to initiate a stay of final agency action pending the completion of judicial review. Moreover, it would seem to be in the public interest as well as the interest of the parties for the Department to expeditiously conclude this matter. See Consolidated Edison Co. of N.Y., Inc., 17 Ad L.2d 355 (FPC, 1965).

ORDER

For the reasons stated above, and in accordance with 43 CFR 4.361(b), the administrative record, including the Recommended Decision of Chief Administrative Law Judge L. K. Luoma, is hereby REFERRED to the Assistant Secretary for Indian Affairs for final resolution.

Done at Arlington, Virginia.

_____
Wm. Philip Horton
Administrative Judge

We concur:

_____
Mitchell J. Sabagh
Administrative Judge

_____
Alexander H. Wilson
Chief Administrative Judge

---

7/ In a telephone call to Charles A. Hobbs, attorney for plaintiffs, initiated by the author of this opinion on March 14, 1978, Mr. Hobbs expressed the opinion that Helen Kirschling's court action encompasses all claims for alleged excess charges realizable unto the date of adjudication.
8/ Plaintiffs' First Amended Petition in Docket No. 775-71 was filed October 2, 1972. On February 2, 1973, the Court dismissed the amended petition to the extent that it asks for an accounting by the Government before the Government's liability has been ascertained. The United States filed a motion for dismissal for lack of jurisdiction on September 30, 1977. The Court is expected to hear oral argument on this motion within the next few months.